

# IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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## COMPLETE TITLE OF CASE

SHELTER PRODUCTS, INC.,

Respondent,

v.

OMNI CONSTRUCTION COMPANY, INC.,

Appellant.

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**DOCKET NUMBER WD78598**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** January 19, 2016

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## APPEAL FROM

The Circuit Court of Cole County, Missouri  
The Honorable Patricia S. Joyce, Judge

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## JUDGES

Division Three: Ellis, P.J., and Mitchell and Witt, JJ.

CONCURRING.

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## ATTORNEYS

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Attorneys for Appellant.

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## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

SHELTER PRODUCTS, INC.,	)	
	)	
Respondent,	)	
v.	)	OPINION FILED:
	)	January 19, 2016
OMNI CONSTRUCTION COMPANY,	)	
INC.,	)	
	)	
Appellant.	)	

WD78598

Cole County

**Before Division Three Judges:** Joseph M. Ellis, Presiding Judge, and Karen King Mitchell and Gary D. Witt, Judges

Omni Construction Company, Inc., entered into a contract with Jefferson City Retirement, LLC, d/b/a Primrose Retirement Community, to serve as the general contractor for the construction of a retirement home in Jefferson City, Missouri. Omni entered into a subcontract with Shelter Products, Inc., which was to provide related materials for the project. Omni's contract with Primrose contained an arbitration clause. A dispute arose between Omni and Primrose, as well as among various subcontractors, regarding the contract. Omni filed a mechanic's lien on Primrose's property. Shelter and other subcontractors also filed mechanic's liens. Shelter filed a lawsuit to enforce its mechanic's lien, naming Omni, Primrose, and the other lienholders as parties. Omni moved to stay the entire litigation pending the completion of its mandatory arbitration with Primrose. Shelter argued that none of the litigation should be stayed because its claims against Omni were neither subject to arbitration under its agreement with Omni, nor referable to arbitration under Omni's agreement with Primrose. The Circuit Court of Cole County denied Omni's motion to stay litigation and Omni appealed. Because there is at least one issue that is referable to arbitration, we reverse in part, affirm in part, and remand.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

### **Division Three holds:**

1. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2006), governs the applicability and enforceability of arbitration agreements in all contracts involving interstate commerce. The FAA mandates that, in a case in which any issue is referable to arbitration, the court shall, on application of one of the parties, stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.
2. Because a stay is mandatory for issues referable to arbitration, a court must determine whether the specific dispute falls within the scope of the arbitration agreement. Ambiguities as to the scope of the arbitration are resolved in favor of arbitration.
3. While interlocutory orders are normally not subject to appeal, the FAA states that an appeal may be taken from an order refusing a stay. Accordingly, despite the fact that such orders are not final judgments, the denial of a mandatory stay under federal law is appealable under the FAA.
4. The arbitration agreement between Omni and Primrose covers “[a]ny [c]laim arising out of or related to the [ir c]ontract, except claims relating to aesthetic effect and” enumerated categories of disputes for which arbitration is specifically waived. Omni’s claim against Primrose in this lawsuit alleges that Omni performed its work according to the specifications of the contract, and that Primrose failed to provide full payment under the provisions of the contract, and seeks a judgment in the amount of the alleged underpayment. These “issues aris[e] out of or relate to the [c]ontract” between Omni and Primrose. Accordingly, the FAA mandates Omni’s claims against Primrose be stayed in the present lawsuit.
5. The FAA has not, however, been interpreted as requiring a stay of the entire lawsuit if only certain, but not all, issues in the lawsuit are referable to arbitration. Rather, a case may involve both arbitrable and nonarbitrable issues, in which situation a court must determine whether to stay the suit pending arbitration of the arbitrable issue or to allow the suit and the arbitration to move forward simultaneously. If the court concludes that some but not all claims are arbitrable, it must then determine whether to stay the balance of the proceeding pending arbitration.
6. Courts have held that the FAA is broad enough to mandate a stay of litigation between nonarbitrating parties as long as that lawsuit is based on issues referable to arbitration under an arbitration agreement governed by the FAA. However, a willing signatory to an arbitration agreement seeking a mandatory stay of litigation involving *non*-signatories must establish at least one of five theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; or (5) estoppel.
7. Omni argues what may be considered a form of estoppel, which could render litigation subject to stay if the claims in the litigation are based upon the same operative facts and are inherently inseparable from the claims in the arbitration.

8. But Omni has made no effort to show how Shelter's claims that Omni has breached its contract with Shelter are inherently inseparable from Omni's claims against Primrose, which are presently being arbitrated. The claims appear to rely on completely different operative facts. Omni's only attempt to show any connection between the arbitration and the remaining litigation is its claim that if Omni is successful in the arbitration and recovers in full from Primrose, that could increase the potential recovery for Shelter and the other lienholders in the litigation. This potential tangential effect on the litigation falls well short of making the arbitration "inherently inseparable" from the remainder of the litigation. This is especially true given that Shelter's contract with Omni does not condition Shelter's right to payment on Omni first being paid by Primrose.
9. An equitable mechanic's lien action is the exclusive method of litigating liens and other claims regarding property when multiple mechanic's liens have been filed. Other litigation addressing related claims must be dismissed, and the pending claims must be litigated in a single action.
10. Arbitration is a proceeding separate from litigation based upon its underlying purpose of encouraging dispute resolution without resort to the courts. Thus, the arbitration agreement between Primrose and Omni is enforceable regardless of whether multiple mechanic's liens exist creating a basis for an equitable mechanic's lien action.
11. The fact that the underlying litigation is an action in which several mechanic's liens have been asserted does not necessarily mandate that the entire litigation is subject to a mandatory stay. As with other litigation, portions of a mechanic's lien action may be referred to arbitration and stayed, while other portions of the litigation may proceed.
12. A partial stay will eliminate the trial court's ability to render a final judgment on all issues as to all of the parties—particularly the rights of each of the parties to prioritize and enforce their equitable liens. But the remaining parties will be allowed to engage in discovery and dispositive motions regarding their underlying contractual claims while Omni and Primrose's arbitration moves forward. The FAA allows for certain claims to be litigated while others are referred to arbitration. And the Missouri Supreme Court has held that some issues in mechanic's lien litigation may be subject to arbitration, and mandatory stay, while others are not.
13. The right to appeal is purely statutory, and where a statute does not give a right to appeal, no right exists. The denial of an interlocutory order is not a final judgment and therefore not appealable.
14. While the FAA allows for an appeal from an interlocutory order denying a mandatory stay, state law does not contain such an appeal procedure for the denial of a stay. Accordingly, Omni's appeal from the trial court's denial on state law grounds is premature.

15. On remand, the trial court may determine whether, due to the partial stay, it should exercise its discretion to stay some or all of the remaining claims in the litigation.

**Opinion by: Karen King Mitchell, Judge**

January 19, 2016

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